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## GURBACHAN SINGH BAGAWAN SINGH v. PRITAM SINGH DIAL SINGH

HIGH COURT MALAYA, IPOH
SM KOMATHY JC
[CIVIL SUIT NO: 22NCVC-73-07-2014]
8 APRIL 2015

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***TORT:*** *Defamation – Absolute privilege – Defamatory statement made in chambers of Registrar – Whether statement made in course of judicial proceedings – Whether defendant party to proceedings – Whether expression of legal proceedings extends to all appearances, substantive and ancillary, mention or case management or hearing before a judicial officer or judge in respect of any matter*

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The plaintiff, an advocate and solicitor, was acting for one Dalber Singh ('Dalber') in a civil action against the defendant and one Sarjeet Singh ('Sarjeet') who was the legal and registered owner of the property ('the property'). In the action, Dalber's claim was dismissed and he was ordered to deliver to the defendant vacant possession of the property which was the subject matter of dispute in the action. Dalber failed to do so and therefore, the defendant and Sarjeet sought to enforce the court order by filing an application for leave to issue a writ of possession. On the date that the matter was fixed for mention before the Registrar, the matter was stood down on the request of the plaintiff. When the plaintiff appeared before the Registrar, the defendant's counsel was not in attendance. Subsequently, the plaintiff proceeded again to the Registrar's chambers and obtained an adjournment to file an affidavit to oppose the application for the issuance of a writ of possession. The plaintiff undertook to inform the defendant's counsel of the new date and immediately tried to communicate with the defendant's counsel, but failed. Later, when the defendant's counsel appeared in the Registrar's chambers with the defendant and were informed of the adjournment, the defendant's counsel complained that the plaintiff had not informed her of his intention to seek an adjournment. It was at this juncture that the defendant was alleged to have interrupted and uttered statements to the Registrar slandering the plaintiff. The plaintiff thus commenced defamation proceedings against the defendant, alleging that the words complained of slandered and defamed his reputation as a senior member of the legal profession. The defendant relied on the defence of absolute privilege and sought to strike out the plaintiff's claim under O. 18 r. 19(1) of the Rules of Court 2012. However, the plaintiff contended that the defendant's reliance on the defence was misconceived on grounds, *inter alia* (i) the defendant was not a party to the application for the issuance of a writ of possession; (ii) the words complained of were not uttered in the course of legal proceedings as the matter was only fixed for mention and not hearing; and (iii) absolute privilege only applied to statements made in relation to the parties to the proceedings or the issues to be determined in the writ of possession.

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**Held (allowing defendant's application to strike out plaintiff's claim with costs):**

**(1)** It is the occasion of publication rather than the particular words which determine whether or not absolute privilege applies. Therefore, the relevance or the falsity of the words would not defeat absolute privilege, save perhaps where the words are completely unconnected to the proceedings or extraneous to the occasion. (para 30)

**(2)** The defendant was a party to the civil action in which the application for the writ of possession was made and therefore, he continued to be a party in all the applications made in that civil action. The fact that it was Sarjeet who was entitled to apply for the writ of possession did not *ipso facto* make the defendant a stranger to the proceedings. (para 31)

**(3)** The expression legal proceedings extends to all appearances, substantive and ancillary, be it a mention or case management or hearing before a judicial officer or judge in respect of any matter. The court was therefore not persuaded that a mention did not come within the ambit of legal proceedings. (para 32)

**(4)** Absolute privilege attaches to all manner of things spoken or done in the course of judicial proceedings and there is no requirement that it must have reference only to the parties or the subject matter of the proceedings. It covers a broad spectrum of everything done or said before a judge and a party who publishes matter which is untrue, immaterial, irrelevant and impertinent is not liable to answer for it and an action for defamation will not lie in respect of them. In the present case, the words complained of by the plaintiff plainly fell within the first category of absolute privilege as mentioned in the case of *Lincoln v. Daniels* and were therefore protected from defamation action. (paras 33 & 34)

**Case(s) referred to:**

*Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC* ***(refd)***

*Cornelius Jimbangan v. Joseph Crispin & Anor; Michael Persius Ubu (Third Party) [2009] 10 CLJ 87 HC* ***(refd)***

*Evelyn Kiew Ai Chin v. Goh Koh Chai [2011] 1 LNS 1614 HC* ***(refd)***

*Jai Ram & Anor v. State AIR 1953 All 137* ***(refd)***

*Lincoln v. Daniels [1961] 3 All ER 740* ***(foll)***

*Mahadevi Nadchatiram v. Thiruchelvasegaram Manickavasegar [2001] 3 CLJ 65 CA* ***(refd)***

*Royal Aquarium & Summer & Winter Garden Society Ltd v. Parkinson [1892] 1 QB 431* ***(refd)***

*S Ashok Kandiah & Anor v. Dato' Yalumallai Muthusamy & Anor [2011] 1 CLJ 460 CA* ***(foll)***

*Sirros v. Moore [1974] 3 All ER 776* ***(refd)***

*Taylor & Ors v. Director of the Serious Fraud Office & Ors [1999] 2 AC 177* ***(refd)***

**Legislation referred to:**
Rules of Court 2012, O. 18 r. 19(1)

**Other source(s) referred to:**
JG Fleming, *The Law of Torts*, 9th edn, p 617

*For the plaintiff - Amir Faliq Muhamad Jamil; M/s Bachan & Kartar*
*For the defendant - Cheong Sek Kwan (Nor Azali Nordin with him); M/s Chan & Assocs*

*Reported by S Barathi*

## JUDGMENT

**SM Komathy JC:**

### The Application

**[1]** This is an application by the defendant under O. 18 r. 19(1) of the Rules of Court 2012 ("ROC") to strike out the plaintiff's writ and statement of claim against him for slander. The alleged defamatory statement was made in the chambers of the Registrar of the Ipoh High Court. The sole issue in these proceedings is whether the plaintiff's claim must be struck out on the ground that the statement made by the defendant was made in the course of judicial proceedings and consequently enjoys absolute privilege.

### The Facts

**[2]** Only a brief sketch of the facts is necessary for the determination of this point. Sometime in 2005, one Dalber Singh a/l Dial Singh ("Dalber"), instructed the plaintiff, an advocate and solicitor, to institute Civil Action No. 22-197-2005 in the Ipoh High Court against the defendant, Dr Pritam Singh a/l Dial, and one Sarjeet Singh a/l Dial Singh ("Sarjeet"). The defendant, Sarjeet and Dalber are siblings.

**[3]** Dalber's claim was dismissed and judgment entered favour of the defendant and Sarjeet on their counterclaim. Dalber was ordered to deliver the defendant the vacant possession of the property which was the subject matter of dispute in that civil action. Sarjeet was the legal and registered owner of the said property.

**[4]** When Dalber Singh failed to deliver vacant possession in accordance with the court order, the defendant and Sarjeet sought to enforce the court order by filing an application for leave to issue a writ of possession. The affidavit in support of the application was affirmed by Manjeet Kaur a/p Kehar Singh, the advocate and solicitor who was representing the defendant and Sarjeet in the said civil action. She deposed that she was authorised by the defendant and Sarjeet to affirm the same on their behalf. The application was fixed for mention on 23 May 2014 before the Registrar.

**[5]** On the morning of 23 May 2014, at the request of the plaintiff, Manjeet Kaur appeared before the Registrar, Siti Hafiza binti Jaafar, and requested for the matter to be stood down as the plaintiff had an urgent injunction application that morning. At about 9.15am, the plaintiff proceeded to the chambers of the Registrar and was informed that the matter had been stood down. At 10am, the plaintiff went back to the Registrar's chambers but Manjeet Kaur was not in attendance as yet. He again proceeded to the Registrar's chambers at 10.25am and informed the Registrar that his client wished to file an affidavit to oppose the application for the issuance of a writ of possession. He sought a new date and the application was then adjourned to 30 May 2015, on his undertaking to inform Manjeet Kaur of the new date. The plaintiff then immediately tried to communicate with Manjeet Kaur on her handphone but failed.

**[6]** A little later, at 10.35am, the defendant and Manjeet Kaur went into the Registrar's chambers and were informed that the application had been adjourned. Manjeet Kaur thereupon complained to the Registrar that the plaintiff had not informed her of his intention to seek an adjournment to enable his client to file an affidavit in reply. At this juncture, the defendant is alleged to have interrupted her and uttered statements to the Registrar slandering the plaintiff.

**[7]** In July 2014, the plaintiff commenced defamation proceedings against the defendant. By para. 15 of the statement of claim, the plaintiff alleged that the defamatory words uttered by the defendant to the Registrar had been recorded by the Registrar and the following extract appears in the notes of proceedings:

> Saya ingin Puan rekodkan, En. Bachan being a senior lawyer has given those lame excuses even in the Court of Appeal. He should at least informed my lawyer if he want to ask for adjournment. Kes ini berlarutan sejak 2005. I am working with MARA and there were few patients coming to see me. Because I am in court I have to ask somebody else to attend to my patients and I need to pay them, I suffer loss. I am shock how a senior lawyer can act like this in the court of law.

**[8]** It was alleged that the words complained of slandered and defamed his reputation as a senior member of the legal profession.

**[9]** In his defence, the defendant, *inter-alia*, relied on the defence of absolute privilege.

**The Law On Striking Out**

**[10]** Order 18 r. 19 ROC provides as follows:

> The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:
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> (a) it discloses no reasonable cause of action or defence, as the case may be;

A (b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court,

and may order the action to be stayed or dismissed or judgment to be B entered accordingly, as the case may be.

**[11]** The leading case on the law relating to striking out is *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7, [1993] 3 MLJ 36. Mohamed Dzaiddin SCJ explained:

C The principles upon which the Court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley M.R. in *Hubbuck v. Wilkinson* [1899] 1 QB 86, p. 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable".

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**[12]** The summary process under O. 18 r. 19 can be invoked only in a plain and obvious case. The cases that have examined the phrase plain and obvious have held that an action or defence that is "plainly or obviously" unsustainable would be one which is either legally or factually unsustainable. E It may be legally unsustainable where it is clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seek.

**Position Of The Parties**

F **[13]** The defendant contended that even if he had uttered the words complained of, the words complained of are protected based on a well-recognised privilege that attaches to all statements made by parties in the course of legal proceedings. The defence of absolute privilege precluded the plaintiff from maintaining this defamation action against him.

G **[14]** The plaintiff accepted the proposition that absolute privilege protected statements made by parties in the course of legal proceedings, but contended that the defendant's reliance on this defence in the present case was misconceived on three grounds.

**[15]** The first, the defendant was not a party to the application for the H issuance of a writ of possession. He had no locus to apply for the writ of possession as it was Sarjeet who was the registered owner of the property. At such, the defendant was not a party to the proceedings and had no business appearing before the Registrar on 23 May 2014.

**[16]** Secondly, if at all the defendant was a party, then the words I complained of were not uttered in the course of legal proceedings as the matter was only fixed for mention and not hearing. For this proposition, he relied on the following passage from an Indian case of *Jai Ram & Anor v. State*, AIR 1953 All 137 at p. 139:

> The expression 'proceedings' with reference to a case, would imply taking of steps in connection with the further progress of the case when a case is listed for hearing and the case is taken up by the Court and an order is made in the case, it would be proceedings in the same.

**[17]** Thirdly, even if the court decided the first and second issues in the defendant's favour, the defence would still fail as absolute privilege only applied to statements made in relation to the parties to those proceedings or the issues to be determined in the writ of possession. The statement made by the defendant in the instant case was not uttered in respect of any issue in connection with the matter or application nor against Dalber but personally against his solicitor. In this connection, the plaintiff placed considerable reliance on the following passage in the judgment of Haidar Mohd Noor JCA in *Mahadevi Nadchatiram v. Thiruchelvasegaram Manickavasegar* [2001] 3 CLJ 65 where His Lordship stated:

> "we are of the view that if there is no restriction that would amount to giving a counsel or a party a *carte blanche* to make a defamatory statement of a person or party who has absolutely no connection with the proceedings before the court". Surely this cannot be the position and with respect, we disagree with the learned judge on "his view there must be no restriction placed in the way of the principle".

**Law On Absolute Privilege**

**[18]** It has been settled law since the 19th century that the common law doctrine of absolute privilege protects all statements made in the course of legal proceedings. No action in defamation could thus be brought against a witness, the parties, the advocates or, indeed, the judge for anything said before a court or tribunal. In *Royal Aquarium & Summer & Winter Garden Society Ltd v. Parkinson* [1892] 1 QB 431 Lopes LJ explained the common law defence of absolute privilege as follows (at p. 451):

> The authorities established beyond all question this: that neither party, witness, counsel, jury, nor judge, can be put to answer civilly or criminally for words spoken in office; that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any court recognised by law, and this though the words were written or spoken maliciously, without any justification or excuse, and from personal ill will or anger against the party defamed.

**[19]** The best exposition of the present law on absolute privilege is found in the judgment of Lord Justice Devlin in *Lincoln v. Daniels* [1961] 3 All ER 740. In that case, letters which were sent by the defendant to the secretary of the Bar Council alleging professional misconduct against the plaintiff. The defendant took the position that the letters constituted a step in an inquiry before the Bench of the plaintiff's Inn of Court, so were entitled to the absolute privilege which attached to those proceedings. It was held that

there was no merit in the argument as although an inquiry by Benchers of an Inn of Court was a judicial process to which absolute privilege attached, the Bar Council was not the agent of the Benchers and the letters sent to the Bar Council were consequently not a step in the Inn of Court inquiry.

**[20]** Lord Justice Devlin, in considering the scope and ambit of absolute privilege in relation to judicial proceedings held:

> The absolute privilege which covers proceedings in or before a court of justice can be divided into three categories.
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> The first category covers all matters which are done coram judice. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence. The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of proceedings and starting with the writ or other document which institutes the proceedings. The third category is the most difficult of the three to define. It is based on the authority of *Watson v. M Ewan* [1905] AC 480 in which the House of Lords held that the privilege attaching to evidence which a witness give coram judice extended to the precognition of proof of that evidence taken by a solicitor. It is immaterial whether the proof is or is not taken in the course of proceedings. In *Beresford v. White* (1914) 30 LTR 59 the privilege was held to attach to what was said in the course of an interview by a solicitor with a person who might or might not be in a position to be a witness on behalf of his client in contemplated proceedings.

**[21]** The aforestated principle of absolute immunity to parties, their representatives, witnesses and lawyers is but an extension of the principle of immunity accorded to judges. Lord Denning MR in *Sirros v. Moore* [1974] 3 All ER 776 at p. 781 explained the immunity to judges as below:

> Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action ... Of course if the judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to an action for damages. The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear. It was well stated by Lord Tenterden CJ in *Garnett v. Ferrand*:

> This freedom from action and question at the suit of individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may free in thought and independent in judgment, as all who are to administer justice ought to be.

**[22]** JG Fleming in his book, *The Law of Torts*, 9th edn. at p. 617 explained the rationale for this policy:

> Freedom of speech without fear of consequences is considered indispensable for the proper and effective administration of justice. All concerned in judicial proceedings, therefore - from judge and jury to solicitor and counsel, parties and witnesses - enjoy absolute protection for what they say, conceded "with the knowledge that courts of justice are presided over by those who from their high character are not likely to abuse the privilege, and who have the power and ought to have the will to check any abuse of it by those who appear before them".

**[23]** The principles of absolute privilege as articulated in *Royal Aquarium & Summer & Winter Garden Society* and *Lincoln v. Daniels* have been adopted and applied in several local cases. See *Evelyn Kiew Ai Chin v. Goh Koh Chai* [2011] 1 LNS 1614 and *Cornelius Jimbangan v. Joseph Crispin & Anor; Michael Persius Ubu (Third Party)* [2009] 10 CLJ 87; [2009] 6 MLJ 82.

**[24]** The limits of this privilege was explored by Abdul Malik Ishak JCA in the case of *S Ashok Kandiah & Anor v. Dato' Yalumallai Muthusamy & Anor* [2011] 1 CLJ 460. In that case, one Dato' Tan Chin Woh, brought an action against the first respondent for the recovery of a friendly loan. The first respondent who was not represented by solicitors, filed an application to strike out Dato' Tan's claim. It was fixed for hearing on 13 August 1999. The appellant appeared as counsel for Dato' Tan and informed the court that he intended to raise a preliminary objection to the application. In the course of arguments, the appellant observed that the first respondent was being assisted by the second respondent, though on record he was noted as acting in person. The second respondent who was seated next to the first respondent at the Bar table. Whereupon, the appellant asked the Sessions Judge to query the second respondent's locus to be seated at the Bar table. At this juncture, the first respondent informed the court that the second respondent was a clerk in his office. When the appellant went back to his office, he asked a colleague to call the first respondent's office to verify the position of the second respondent and was informed that the second respondent was not a staff there. The appellant further checked with the Bar Council and was told that that the second respondent was a pupil in the chambers of one Mr Ganeswaran Doraisamy of Messrs Ganeswaran Mustafa & Chan, Klang.

**[25]** Consequently, on the same day, the appellant wrote a letter to the first respondent and copied the same to the Sessions Court Judge. In the letter, it was stated that the first and second respondent had misled the court and that he would make the necessary application to court against them.

A The respondents responded by filing a libel action against the appellant and the firm in which he was a legal assistant. It was alleged that the appellant had defamed them by the publication of the letter to the court. The appellant relied, amongst others, on the defence of absolute privilege.

B **[26]** The High Court rejected all the defences relied upon by the appellant and allowed the respondents' claim. The appellant appealed. In allowing the appeal, the court held that the judge had erred in holding that the publication of the letter was not protected by absolute privilege as the letter was published in connection with judicial proceedings and was an initiation by the appellant for sanctions to be imposed by the Sessions Court Judge against C the respondents. Abdul Malik Ishak JCA observed:

> [8] And according to the case of *Henry Edmund Taaffe, Esq. v. The Right Hon. William Downes*, Lord Chief Justice of the Court of King's Bench in Ireland [1813] 15 ER 3 Moore 35 at 47, it is immaterial whether such proceedings take place in open court or in private. D It is also immaterial that the proceedings are of a final or preliminary character (*Bottomley v. Brougham* [1908] 1 KB 584 at 588) and whether they are conducted *ex parte* or *inter partes*.
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> [9] In short, absolute privilege attaches to statements made in the course of judicial proceedings. Indeed, *Gatley on Libel and Slander*, 11th edn, at p. 382 wrote that: E
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> > No action will lie for defamatory statements, whether oral or written, made in the course of judicial proceedings before a court of justice or a tribunal exercising functions equivalent to those of an established court of justice.
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> F [12] In this appeal, the evidence adduced plainly shows that the words in the impugned letter were nothing more than a reiteration of the words spoken in court and published in the course of judicial proceedings. At para. 4 of their statement of claim as seen at p. 61 of the appeal record at vol. 1, the plaintiffs averred that the impugned letter "... concerning the plaintiffs in relation to their G conduct in the proceeding at Court 9 Kuala Lumpur Sessions Court Summons Case No: 7-52-19989-98 on 13 August 1999 ...". The evidence adduced further shows that the first defendant wrote the impugned letter to place on record the events that transpired on 13 August 1999 as he believed that, as an officer of the court, he had a duty to do so and that by doing so he was merely discharging H that duty.
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> [16] It is ideal to remember that the legal consequence of absolute privilege is this. That whether the words are relevant or irrelevant, true or false, malicious or *bona fide*, the action must be regarded as baseless and frivolous (*Fitzherbert v. Acheson* [1921] NZLR 265, 269, I SC).

**[27]** It would appear that there is a conflict between the view expressed in *Mahadevi Nadchatiram v. Thiruchelvasegaram Manickavasegar* (*supra* [16]) and *S Ashok Kandiah & Anor v. Dato' Yalumallai Muthusamy*. In my view, the decision in *S Ashok Kandiah* is to be preferred to avoid a multiplicity of actions, where one court would have to examine whether a statement made before another is true or not.

**[28]** It is because of this rule that advocates and expert witnesses can only be sued for negligence and not for defamation in respect of acts or omissions arising out of their respective parts in the conduct of litigation.

**[29]** It is also trite law that the immunity rule does not extend to actions for malicious prosecution where the cause of action is predicated in the abuse of the legal process maliciously and setting the law in motion against the plaintiff without reasonable cause. See *Taylor & Ors v. Director of the Serious Fraud Office & Ors* [1999] 2 AC 177.

**[30]** It is clear from these decisions that it is the occasion of publication rather than the particular words which determine whether or not absolute privilege applies. Therefore the relevance or the falsity of the words would not defeat absolute privilege, save perhaps where the words are completely unconnected to the proceedings or extraneous to the occasion.

**Application To The Facts**

**[31]** Turning now to the issues that arise in this application, the first is whether the defendant was a party to the proceedings for the issuance of a writ of possession. It is true that Sarjeet Singh was the registered owner of the subject property, and consequently in law the party who was entitled in law to apply for a writ of possession to recover vacant possession of the property from Dalber. However, it is imperative to note that the defendant was a party to the civil action in which the application for the writ of possession was made. As such, he continued to be a party in all the applications made in that civil action. In my judgment, the fact that it was Sarjeet Singh who was entitled to apply for the writ of possession does not *ipso facto* make the defendant a stranger to those proceedings. Accordingly, there is no merit in the contention advanced by the plaintiff.

**[32]** On the second issue relating to the plaintiff's complaint that the words the defendant uttered were not in the course of legal proceedings, again I am not persuaded that a mention does not come within the ambit of legal proceedings. In my judgment, the expression legal proceedings extends to all appearances, substantive and ancillary, be it a mention or case management or hearing before a judicial officer or judge in respect of any matter.

**[33]** That brings me to the third issue, namely that to attract absolute privilege, there is a requirement that the statement must have reference to the subject matter of the proceedings. The decision in *S Ashok Kandiah & Anor v. Dato' Yalumallai Muthusamy & Anor* concludes the issue in the defendant's

favour. It is pertinent to observe that in *Ashok Kandiah*'s case, the statements made by the appellant had no reference to the striking out application before the court, but on the capacity of the second respondent to assist the first respondent. Yet, the court found that it was insulated from defamation action. The decision illustrates that absolute privilege attaches to all manner of things spoken or done in the course of judicial proceedings and there is no requirement that it must have reference only to the parties or the subject matter of the proceedings. It covers a broad spectrum of everything done or said before a judge and a party who publishes matter which is untrue, immaterial, irrelevant and impertinent, is not liable to answer for it and an action for defamation will not lie in respect of them.

**[34]** In the present case, the words complained of by the plaintiff plainly fall within the first category of absolute privilege mentioned by Lord Devlin in *Lincoln* (*supra*) and are therefore protected from defamation action.

**Conclusion**

**[35]** In the result, the defendant's application to strike out the plaintiff's claim is allowed with costs of RM5,000.